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No. 02-1384

Supreme Court, U.S.
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In The
Supreme Court of the United States

JOE'S STONE CRAB, INC.,

Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Introduction. Even if the Court should accept every word of the Brief in Opposition, Respondent EEOC has conceded by omission a significant split in the federal circuits, requiring resolution by this Court. The EEOC has conceded by its silence Petitioner Joe's demonstration that a pattern-or-practice theory of liability[1] is available only to governmental or class-action plaintiffs, but not to individual claimants or their surrogates (*see* Petition at 12-15); that even if it had been available, the EEOC waived any such theory of liability in this case (*see* Petition at 3-4); and that the importation of such a theory would be a violation of Joe's due-process rights (Petition at 22-24). The EEOC's argument – its only argument – is that such an admittedly-impermissible outcome nonetheless can be achieved so long as the individual disparate-treatment claimant[2] avoids the forbidden phrase "pattern or practice," by importing the identical elements of proof – including that necessary to satisfy the 300-day rule[3] – which heretofore were available only in a pattern-or-practice case. Although this contention is incorrect, and the authorities cited by the EEOC do not support it, at best it concedes conflict with the cited decisions of seven Courts of Appeal (Petition at 12-15 & n. 10) – decisions which the EEOC has ignored.

These decisions do not merely hold that a pattern-or-practice *claim* is unavailable to an individual claimant or its surrogate. They hold that the pattern-or-practice *method of proof* is unavailable to the individual claimant under *any* theory of liability.[4] Compare the EEOC's central thesis to the holdings of these cases. At pages 13-14 of its Brief in Opposition, it acknowledges that the method of

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[1] Section 707 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-6(a).

[2] Section 703 of Title VII, 42 U.S.C. §2000e-2(a).

[3] Section 706 of Title VII, 42 U.S.C. §2000e-5(e)(1).

[4] As the EEOC concedes, a key difference between the two causes of action "lies in the methods of proof . . ." (Br. Opp. 8 n. 2).

proof sanctioned by the Court of Appeals is not to be found in any authority outlining the proof required in an individual disparate-treatment case, but rather is the *Teamsters* paradigm for proving a pattern or practice of systemic discrimination.[5]

This confession of the EEOC's borrowed methodology collides headlong with the cited decisions of seven Courts of Appeal. For example, the court said in *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 761 (4th Cir. 1998) (emphasis added)[6]: "[W]e decline to give individual plaintiffs a pattern or practice cause of action or allow them to use the *Teamsters* ***method of proof.***" The court said in *Celestine v. Petroleos de Venezuela, S.A.*, 266 F.3d 343, 355 (5th Cir. 2001) (emphasis added): "[T]he district court did not err in refusing to apply the *Teamsters* ***method of proof*** as an independent method of proof to the applicants' individual claims in lieu of the *McDonnell Douglas* method."[7]

Therefore, even if there were any authority prior to *Joe's II*[8] supporting the EEOC's method of proving individual disparate treatment, at best it would conflict with seven Court of Appeals decisions to the contrary. And in addition, there is no prior authority. The EEOC has cited two lines of cases. The first (Br. Opp. 11-12) states the unremarkable proposition – which we have conceded throughout this litigation – that evidence of systemic

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[5] *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 365 (1977). The EEOC quotes only *Teamsters'* statement of the elements of proof in a pattern-or-practice case. It then posits, citing no authority: "[T]he Court's reasoning in *Teamsters* would apply wherever an employer's policy of discrimination is sufficiently well known that it deters qualified applicants from applying, regardless of the method of proving discriminatory intent" (Br. Opp. 14).

[6] *Vacated on other grounds*, 527 U.S. 1031 (1999), *reinstated in relevant part*, 206 F.3d 431, 437 (4th Cir.), *cert. denied*, 531 U.S. 822 (2000).

[7] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

[8] *EEOC v. Joe's Stone Crab, Inc.*, 296 F.3d 1265 (11th Cir. 2002) (App. 1a).

discrimination "is *relevant* to an individual intentional discrimination claim . . . " (Br. Opp. 11) (emphasis added). This is correct (in the "pretext" stage of a disparate-treatment case), and beside the point. The controlling question is whether proof of systemic wrongdoing is *alone sufficient* to sustain an individual disparate-treatment claim, given that *no evidence* of individual discrimination toward the claimants was offered in this case.

The second line of cases cited (Br. Opp. 15-16) assertedly holds that "individual disparate treatment [claimants] need not go through the futile gesture of applying in order to state a claim under Title VII" (Br. Opp. 15). But every appellate decision cited falls into one of the two (and only two) exceptions to the *McDonnell Douglas* paradigm which we acknowledged in the Petition (p. 16 n. 12), neither of which applies here.[9] The EEOC's regurgitation of these authorities does nothing to bolster the Court of Appeals' radical departure from 30 years of established law. Nor does the EEOC's doublespeak defense of that departure – its insistence that labeling a duck a swan can disguise how it walks, sounds or looks. It offers not precedent or persuasion, but only its own *ipse dixit* – a "tour de force reminiscent not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini. . . . " *United Steelworkers of America v. Weber*, 443 U.S. 193, 222 (1979) (Rehnquist, J., dissenting).

Argument.[10] As we emphasized (Petition at 16 n. 12), before *Joe's II* a disparate-treatment claimant could be

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[9] All are cases in which the individual claimant either proved that the employer concealed the availability of job openings, or offered direct evidence of a discriminatory practice specifically affecting the individual claimants – for example, a discriminatory *per se* job advertisement (*see infra* n. 18).

[10] Although the EEOC's counterstatement of facts (Br. Opp. 2-7) is subject to challenge in many respects, at bottom it serves to illustrate the EEOC's almost-exclusive reliance upon the asserted "inexorable zero", *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 342 n. 23 (1977) – its erroneous contention that Joe's hired no

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excused from satisfying her *prima facie* burden under *McDonnell Douglas* only in two narrow situations not applicable here. In all other contexts in an individual disparate-treatment case, the claimant could not recover without proving that she had applied unsuccessfully for the job in question, *McDonnell Douglas*, 411 U.S. at 802, in order to "eliminate[] the most common non-discriminatory reasons" for the employer's decision. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981) (*see* Petition at 16-17). Outside of these two narrow exceptions, recovery on behalf of a non-applicant, assertedly deterred from applying by the "futile gesture" of encountering the employer's "consistently enforced discriminatory policy", *Teamsters*, 431 U.S. at 365-66 – its "standard operating procedure," *id.* at 336 – was reserved for the remedial stage of a pattern-or-practice lawsuit, available only to class-action plaintiffs or the EEOC on their behalf (*see* Petition at 13 n. 10, 17-18).

The difference between the two independent causes of action (*see* Petition at 12-13) is that §707 of Title VII (pattern or practice) proscribes systemic, institutional discrimination, while §703 exclusively focuses on the individual claimant in a specific circumstance, asking whether a "particular employment decision" was made on

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women servers, assertedly because of discrimination – as a substitute for proving individual disparate treatment of specific claimants. Typical is the EEOC's review of the hiring numbers between 1913 and 1991, coupled with its misrepresentation that those numbers compared unfavorably to "comparable Miami area restaurants . . ." (Br. Opp. 2). In fact, as the court noted in *Joe's I*, *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263 (11th Cir. 2000), most of the other restaurants "are not located on Miami Beach" (App. 39a n. 6) – a critical observation in light of Joe's uncontradicted evidence that female server applicants were deterred during the period in question by high crime in the area of Joe's location, in addition to the weight of the trays which the servers carry, and the fast pace of the service at Joe's (citations in the Petition at p. 5 n. 2). This evidence was uncontradicted, as was the evidence that Joe's always employed female servers, in direct proportion to the percentage of female applicants, during the entire period in question (*id.*).

the basis of a statutorily-protected status.[11] In this context, the EEOC's position and the appellate court's disposition in *Joe's II* could not be more significant; they imported wholesale into the individual disparate-treatment analysis, as a new, third exception to the *McDonnell Douglas* formulation, the entirely-distinct and fundamentally different pattern-or-practice analysis, without requiring any evidence of individual discrimination against an individual claimant, and as the EEOC admits (Br. Opp. 9), without imposing the heightened burden of proof which is required in a pattern-or-practice case.

To be sure (*see* Petition at 11), the court effected this result in the language of individual disparate treatment (*see* App. 16-17), and the EEOC adheres to that fiction. But the substance of its argument is pattern-or-practice.[12] But notwithstanding that the district court's finding of

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[11] *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 875 (1984). The EEOC itself said exactly that in its amicus brief in *Cooper* (No. 83-185) at 15, emphasizing

> the different character and methods of proof of the two types of claims. Individual claims focus on the treatment of a specific individual on a specific occasion. The basic question is whether that individual was denied an employment opportunity for a discriminatory reason .... The ultimate question for the trier of fact is whether the employer or its agent, in taking the particular employment action in question, was actually motivated by discrimination or by legitimate business reasons.

[12] In *Teamsters*' language, a pattern-or-practice claim alleges that "unlawful discrimination [was] a regular procedure or policy followed by the employer.... " 431 U.S. at 360. *See Celestine v. Petroleos de Venezuela, S.A.*, 266 F.3d 343, 355 (5th Cir. 2001) (burden in pattern-or-practice case is to "establish a *prima facie* case that such a 'policy' existed"); *Brown v. Coach Stores, Inc.*, 163 F.3d 706, 711 (2nd Cir. 1998) (*Teamsters* pattern-or-practice claim is based on a "proven ... history of systemic discrimination"); *Lowery v. Circuit City Stores, Inc.*, 158 F.3d at 760. The EEOC's formulation is identical. It says (Br. Opp. 9) that "[t]he EEOC did demonstrate that petitioner maintained an implicit policy of regularly and consistently discriminating on the basis of sex in hiring food-servers .... "

such an "implicit" policy (Br. Opp. 6, 7, 8, 9, 11) was the sole basis for its individual disparate-treatment judgment, the EEOC insists that the it did not "convert the case into one relying on a pattern or practice standard of proof" (*id.* at 8). Whether acknowledged or not, that is exactly what the court did in fact.

For every material element of an individual disparate-treatment case – including the necessity of application, rebuttal of the employer's legitimate non-discriminatory explanation, and the proof necessary to avoid the 300-day requirement – the Court of Appeals substituted the alleged proof of a pattern or practice for the *McDonnell Douglas* paradigm. First, the EEOC and the Court of Appeals substituted the asserted proof of a systemic wrongful policy for the individualized showing which defines an individual disparate-treatment claim (*see supra* pp. 4-5 & n. 11). There is no record evidence which even addresses the individualized showing required under *McDonnell Douglas*. Whether the policy found was explicit or "implicit", it was never shown to have affected any of the claimants. The EEOC's proof was directed only to the *Teamsters* formulation for proving a pattern or practice.[13]

Second, based solely on the finding of systemic discrimination, the EEOC argued, and the Court of Appeals found, forsaking a critical element of the *McDonnell Douglas prima facie* standard (*see* Petition at 16-17 & n. 13), that the claimants could recover even during a period of time in which they did not apply for the job. As we noted (Petition at 11-12), notwithstanding Joe's uncontradicted evidence that when they did apply the claimants were passed over in favor of better applicants (*see* Petition at 10 n. 8) (at a time when Joe's hiring, as always, mirrored the percentage of female applicants), the court found this

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[13] We contend (*see* Petition at 18-19 n. 14) that the EEOC's evidence in this case did not remotely prove a pattern or practice of discrimination, and we will brief the point if the Court should accept review.

evidence "not relevant", "[b]ecause none of the claimants actually applied until after the EEOC filed its charge of discrimination" (App. 11 n. 6).

Third, having acknowledged in *Joe's I* that the hearsay evidence of reputation could not sustain a judgment for disparate treatment,[14] the court in *Joe's II* repudiated all of this, affirming the judgment because of the same hearsay evidence of Joe's reputation, coupled with the claimants' testimony that they were deterred solely by that reputation from applying.

Fourth, having relieved the EEOC of its *prima facie* burden under *McDonnell Douglas*, the Court of Appeals also relieved the EEOC of its burden to establish pretext, despite both the fact that the claimants did not apply and Joe's uncontradicted evidence that it always hired the most qualified applicants (*see* R22-1972-73). Again borrowing the pattern-or-practice formulation, it held that the EEOC's asserted showing of systemic discrimination had shifted to Joe's the burden of proving that *if* the claimants had applied at the time they said they were deterred from applying, they still would have been passed over for better-qualified applicants (App. 11). In contrast, in an individual disparate-treatment case (*see* Petition at 19-20), any proffered justification for the employment action, with no credibility assessment, imposes the plaintiff's ultimate burden of proving pretext.[15]

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[14] *Joe's I* noted that the district court had admitted evidence of Joe's reputation "not for the truth of the matter asserted" (App. 59); that "reputation itself is neither a specific act or a practice" (App. 57); and that evidence of reputation is admissible *only* in a pattern-or-practice case, and only *after* systemic discrimination has been "conceded or proven", and then *only* in fashioning the remedy (App. 57-58) (*see* Petition at 6).

[15] The EEOC's protest (Br. Opp. 9) – that neither the EEOC nor the district court sought to place the burden on Joe's – is not only wrong, but beside the point. The Court of Appeals held that the *prima facie* case assertedly made on the sole basis of systemic wrongdoing, with no evidence of individual discrimination, carried the EEOC's

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Fifth, notwithstanding the absence of any evidence of a specific act of discrimination within 300 days of the EEOC's charge, the Court of Appeals held that generalized proof of systemic discrimination will obviate the requirement in an individual disparate-treatment case of proving that at least one wrongful act was directed to each claimant within 300 days. It therefore engrafted a measure of timeliness heretofore applicable only in a pattern-or-practice case.

On every element of proof, the Court of Appeals substituted the *Teamsters* formula for proving a pattern or practice of discrimination. Indeed, as we noted earlier, the EEOC's only defense of the Court of Appeals' holding is that it properly transposed the *Teamsters* formula.[16] Given that wholesale transposition of the *Teamsters* formula, it is fanciful for the EEOC to assert, as its sole response to the Petition, that the Court of Appeals did not in fact – if not in name – handle the claim as a pattern-or-practice claim (*see* Br. Opp. 7, 8, 9, 11). In Humpty-Dumpty's lexicon, its position is tantamount to saying that disparate treatment "means just what I choose it to mean – neither more nor less." L. Carroll, *Alice's Adventures in Wonderland*, Chapter 6. Or perhaps more appropriate in Orwellian terms, it contends that "[s]ix means eighteen, two plus two equals five, war is peace, freedom is slavery, ignorance is strength,"

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ultimate burden because Joe's had offered "no evidence whatsoever to explain why it failed to hire any of the four claimants" during the time they said they were deterred from applying (App. 11). That placed the burden of proof on Joe's.

[16] Citing no authority, the EEOC says that merely because *Teamsters*' "explanation of the 'futile gesture' doctrine arose in the context of a pattern or practice case does not mean that it must be confined only to such cases.... Rather, the Court's reasoning in *Teamsters* would apply wherever an employer's policy of discrimination is sufficiently well known that it deters qualified applicants from applying, regardless of the method of proving discriminatory intent" (Br. Opp. 14).

and a pattern-or-practice claim is really individual disparate treatment. G. Orwell, *Nineteen Eighty-Four*.

Before *Joe's II*, there was no authority supporting this transposition. There is certainly no support in the unremarkable proposition that even in a disparate-treatment case, proof of systemic discrimination is *relevant* as background (but only in proving "pretext") because such evidence obviously supports and renders more credible the claimant's required proof of individual discrimination (*see* Br. Opp. 11-12).[17] Nor is the EEOC's position supported by its citation of decisions which recognize the two exceptions to the *McDonnell Douglas* framework which we acknowledged

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[17] All of the cases cited, many of which concern the scope of pretrial discovery, hold only that such evidence is relevant. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 524 (1993) (court should consider all evidence), *quoting United States Postal Service Board of Governors v. Aikins*, 460 U.S. 711, 716 (1983) ("trier of fact should consider all of the evidence"); *McDonnell Douglas*, 411 U.S. at 804-05 ("general policy . . . can be relevant . . . in an individual disparate treatment case"); *Bell v. EPA*, 232 F.3d 546, 553 (7th Cir. 2000) (trial court erred in declining to consider statistical evidence in a disparate-treatment case, because such evidence, "[i]n conjunction with other evidence of disparate treatment", is "relevant to and probative of the issue"); *Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, 1520 (10th Cir. 1995) ("unduly limited . . . discovery" was inappropriate because "general practices are relevant even when a plaintiff is asserting an individual claim for disparate treatment"); *Scales v. J.C. Bradford & Co.*, 925 F.2d 901, 906 (6th Cir. 1991) (to prove that "the reasons given [for the adverse action] are pretextual," "information concerning an employer's general employment practices is relevant even to a Title VII individual disparate treatment claim"); *Hollander v. American Cyanamid Co.*, 895 F.2d 80, 84 (2nd Cir. 1990) ("at the pretext stage," "to establish his argument that [the employer's] discharge was pretextual," claimant "may use evidence of company-wide practices"); *Harris v. Birmingham Board of Education*, 712 F.2d 1377, 1383 (11th Cir. 1983) (claim of individual discrimination may be supported by direct evidence of systemic discrimination, including operating under court desegregation orders); *Burns v. Thiokol Chemical Corp.*, 483 F.2d 300, 306 (5th Cir. 1973) (historic practice is "relevant" in an individual case, and thus the trial court should not have limited pre-trial discovery).

in the Petition (p. 16 n. 12).[18] Except in these narrow categories, not applicable here, there is no prior authority which permits a disparate-treatment claimant to prove her case solely through evidence of a systemic practice of discrimination, devoid of any evidence concerning the claimant herself. The only statutory framework under which such proof is permissible is the claim of pattern-or-practice discrimination under §707 of Title VII. That claim was not pleaded; it is available only to class-action or surrogate claimants; no evidence was offered to support it; it was expressly and repeatedly waived; and it was never litigated. And as it concedes, the EEOC did not prove the claim which it did bring – the claim of disparate treatment against specific individuals. The Court of Appeals erred in affirming.

Conclusion. For the reasons expressed above, it is respectfully submitted that the Court should issue a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit.

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[18] *See Babrocky v. Jewel Food Co. & Retail Meat Cutters Union, Local 320*, 773 F.2d 857, 867 & n. 7 (7th Cir. 1985) (information regarding job openings withheld from plaintiff); *Easley v. Empire Inc.*, 757 F.2d 923, 930 n. 7 (8th Cir. 1985) (*dictum*) (direct evidence of discrimination); *Garrett v. Okaloosa County*, 734 F.2d 621, 625 (11th Cir. 1984) (back pay permitted in remedial portion of trial, based on direct evidence of individual discrimination conceded by employer, *id.* at 624 – that "women would not be considered", *id.* at 622); *Banks v. Heun-Norwood*, 566 F.2d 1073, 1076 (8th Cir. 1977) (direct evidence of discrimination); *Hailes v. United Air Lines*, 464 F.2d 1006, 1008-09 (5th Cir. 1972) (discriminatory *per se* advertisement). The EEOC also cites *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1549 (11th Cir.), *cert. denied*, 479 U.S. 883 (1986) ("This is a 'pattern and practice' sex discrimination suit . . .").

Respectfully submitted,

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